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No. 467

In the Supreme Court of the United States

OCTOBER TERM, 1962

JAMES ALVADO AND FRANCIS M. BILBEE,
Petitioners

v.

GENERAL MOTORS CORPORATION
Respondent

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

After the petition herein was filed, this Court granted certiorari in a case under the Labor Management Relations Act (LMRA), 29 U.S.C. 150 et seq., which turns upon the same principle as the present case, *NLRB* v. *Erie Resistor Corp.*, no. 288, this term, certiorari granted October 8, 1962. In that case, the Board held that the employer's grant of superseniority to strikebreakers (replacements and strikers who abandoned the strike) was illegally discriminatory under section 8 (a) (3) of the Act because it inherently discouraged union membership regardless of the absence of any subjective motive to do so. The Third Circuit refused enforcement of the Board's order, on the ground that the employer's motive is the determining factor, and that in the absence of proof of an illegal motive, the obvious discrimination and inherent tendency to discourage union membership do not make the action illegal. 303 F.2d 359, 361-362. In another case on substantially the same facts, the Board again held the employer's conduct to be illegally discriminatory, and was sustained by the Sixth Circuit.

Swarco, Inc. v. *NLRB*, 303 F.2d 668, petition for certiorari pending, no. 335, this term.

The legal issue which the Court has concluded to review in *Erie Resistor* is exactly the same as that in the present case, namely, whether the statutory protection against discrimination is effective only where the employer has the subjective motive of perpetrating the discrimination. This similarity of legal issue is shown by the very recent decision of the Board, on authority of *Erie Resistor*, holding discriminatory under 8(a)(3) the employer's inclusion of strike time within the amount of unexcused absence which caused a forfeiture of profit-sharing benefits. *Quality Castings Company*, case no. 8-CA-2420, November 15, 1962, 51 LRRM 1422. This provision is in substance identical to GM's percentage-of-earnings device here, in that both provisions equate a statute-protected absence (strike time there, military service here) with other types of absence for purposes of reducing the benefit. The Board held that the statutory protection of the absence prohibited the employer from counting it with other absences to reduce or eliminate profit-sharing benefits. In addition (but disclaimed as a basis for the Board's conclusion), the employer changed the qualifying period for profit-sharing participation, to the detriment of the strikers, just as GM here changed its vacation pay provision for the single year in which such change could and did inflict grossly disproportionate losses on the returning veterans. The Board rested its decision in *Quality Castings* on its prior *Erie Resistor* decision.

Thus this Court's impending consideration of *Erie Resistor* will have a direct bearing on the issue in the present case. It is therefore appropriate that the same issue be considered under the veterans' reemployment statutes, by granting certiorari in this case. The interrelation of the facts of the two cases, and the essential identity of

the underlying legal issue refracted through surface differences in those facts, will illuminate the problem and assist in its proper determination, without adding appreciably to the burden of the Court. "Seniority" is involved in each case, since it was a shift from seniority as a basis for vacation pay which precipitated the action against GM. That *Eric Resistor* arises out of industrial strife does not differentiate it from the present case, for it is the very helplessness of the veterans because of their military absence, their inability to protect themselves by organizing strikes or otherwise, that make the reemployment statutes necessary.

The need for a subjective motive of intention to discriminate, what suffices to establish such motive, and whether other legitimate motives excuse the discrimination should, as a practical matter, be much the same under both statutes. But even if there is a substantial difference on this point between LMRA and the veterans' reemployment statutes, it is desirable in administering and applying them that this be known. In either event, the Court's impending consideration of this issue under LMRA, if joined with consideration of the same question under the veterans' reemployment statutes in this case, will present a rare occasion for particularly fruitful and exhaustive examination of the issue, which will inform and refine the Court's insight substantially more than if the veterans' reemployment case is excluded from consideration.

For this reason, it is appropriate that the denial of the petition for certiorari herein be reconsidered, and that the petition be granted.

HARRY MONTGOMERY LEE,
Washington, D. C.
Attorney for Petitioners

CERTIFICATE

I hereby certify that the foregoing petition is presented in good faith and not for delay, that it is restricted to the reason set forth in it which constitutes an intervening circumstance of substantial effect since the petition for certiorari was filed, and that a copy of this petition was mailed, first class postage prepaid, to Aloysius F. Power, attorney for respondent, 3044 W. Grand Boulevard, Detroit, Michigan, on December 28, 1962.

HARRY MONTGOMERY LEET